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81-761

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

ERNEST DONALD SUGGS,

Petitioner

v.

STATE OF ALABAMA,

Respondent

Petition for a Writ of Certiorari
To the Supreme Court of Alabama

JOE R. WHATLEY, JR.
JOHN C. FALKENBERRY
DONALD W. STEWART

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QUESTION PRESENTED

1. Was petitioner denied due process of law by the Trial Court's jury instruction which could have created the impression with the jury that the burden of persuasion on the issue of self-defense was on petitioner, rather than on the State?

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OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals issued May 5, 1981, is reported at ..... So.2d ..... and is reprinted at App. 1 - 12. (pages 1 - 12 of the Appendix to this petition). The Supreme Court of Alabama denied petitioner's petition for a writ of certiorari without opinion on August 21, 1981.

JURISDICTION

On May 5, 1981, the Alabama Court of Criminal Appeals issued a decision affirming petitioner's conviction for assault with intent to murder and sentence of 15 years im-

prisonment. Petitioner filed a motion for rehearing, which was denied on June 23, 1981. He then filed a petition for a writ of certiorari in the Supreme Court of Alabama. That petition was denied on August 21, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "SECTION I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Ernest Donald Suggs, was indicted for assault with intent to murder by the grand jury of Calhoun County, Alabama. He pleaded not guilty. His trial began on June 11, 1979, in the Seventh Judicial Circuit of Alabama. On June 13, 1979, he was found guilty and sentenced to 15 years imprisonment. He gave notice of appeal and filed a motion for new trial, which was denied on August 6, 1979. On May 5, 1981, the Alabama Court of Criminal Appeals affirmed his conviction. Petitioner filed a motion for rehearing which was denied on June 23, 1981. He then filed a petition for a writ of certiorari in the Supreme Court of Alabama on July 7, 1981. That petition was denied on August 21, 1981.

REASON FOR GRANTING THE WRIT

This Court Should Grant Certiorari Because Petitioner was Denied Due Process of Law by the Trial Court's Jury Instruction Which Could Have Left the Impression That the Burden of Persuasion on the Issue of Self-Defense was on Petitioner Rather than the State.

The Trial Court instructed the jury that "[i]t is never presumed that an unlawful homicide or an assault with intent to murder was committed in the right of self-defense . . .". (App. 13) The Trial Court also instructed the jury that all elements of self-defense must be shown to coexist before self-defense would be a defense to an indictment for assault with intent to murder. (App. 14) At no time did the Trial Court clearly instruct the jury that the burden of self-defense always remains on the state.

The United States Court of Appeals for the Fifth Circuit has ruled that it is unconstitutional to place upon the defendant the burden of persuasion on the issue of self-defense. *Holloway v. McElroy,* 632 F.2d 605 (5th Cir. 1980), *cert. den.* 49 U.S.L.W. 3881 (May 26, 1981). Here, as in *Holloway,* based on the Trial Court's instruction, "a reasonable juror could well have believed that the burden was on the defendant to make out . . ." a case of self-defense. *Id.* Thus, as petitioner argued in his brief to the Supreme Court of Alabama, the conviction should be reversed.

As demonstrated by Mr. Justice Rehnquist's dissent to the denial of certiorari in *Holloway v. McElroy,* 49 U.S. L.W. 3881, the relationship between the requirements of due process and burden of proof needs further clarification. The Court should take this opportunity to analyze the decisions in this area (*Leland v. Oregon,* 343 U.S. 790 (1952);

In re Winship, 397 U.S. 358 (1970); *Rivera v. Delaware*, 429 U.S. 877 (1976); *Patterson v. New York*, 432 U.S. 197 (1977)), and then to issue a decision clarifying the law.

CONCLUSION

Petitioner respectfully submits that for the reasons stated by Mr. Justice Rehnquist in his dissent from the denial of certiorari in *Holloway v. McElroy, supra*, this Court should grant certiorari to review this case, and for the reasons left unstated by a majority of this Court, this conviction should be reversed.

Respectfully submitted,

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APPENDIX

A-1

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1980-81

7 Div. 692

Ernest Donald Suggs
v.
State
Appeal from Calhoun Circuit Court

HARRIS, PRESIDING JUDGE

Appellant was convicted of assault with intent to murder and the court sentenced him to fifteen years in the penitentiary. The court further ordered the sentence imposed to run concurrently with a life sentence imposed for murder growing out of the same incident in which the victim's boyfriend was shot in the neck by appellant. At arraignment, in the presence of retained counsel, appellant pleaded not guilty. After sentence was imposed appellant gave notice of appeal and filed a motion for a new trial. This motion was subsequently overruled and denied.

The evidence adduced by the state and that presented by appellant was in sharp conflict and only a jury could reconcile this conflicting testimony and arrive at a verdict.

During the late evening of Saturday, August 19, 1978, or the early morning of August 20, 1978, Leslie Hakes and Kathy Robb were hitchhiking from Jacksonville, Alabama, to Anniston, Alabama. Appellant, who was driving a pick-up truck, stopped to pick them up. Hakes and Robb had spent the previous Friday night, August 18, together in her Army barracks room at Fort McClellan where both were then stationed. Hakes and Robb were unmarried soldiers.

While in Jacksonville they went to a lounge and drank six beers each.

Appellant lived in Anniston with his parents and was a licensed gunsmith. On Saturday morning, August 20, 1978, he went target shooting with a friend and they were shooting a .45 caliber pistol. Appellant owned several pistols including a .38 caliber revolver. On Saturday night he went to Jacksonville alone in his pickup truck and had the .45 pistol and also the .38 pistol in his truck. He drank six beers and bought a six pack of beer to carry with him. Also in the truck was some marijuana. While driving toward Anniston he saw Hakes and Robb on the highway "thumbing" a ride and he stopped his truck to give them a ride.

During the trip to Anniston appellant showed his .45 pistol to Robb and she handed it to Hakes. Hakes returned the pistol to Robb who placed it on the floorboard of the truck. None of the trio wanted to drink warm beer and appellant stated he knew a "bootlegger" where they might be able to get some cold beer. He drove to a trailer where the "bootlegger" resided and knocked on the door but got no response. He returned to his truck and asked the couple if they would like to go partying and they agreed. Appellant drove up a bumpy road which opened up into a clearing overlooking Anniston. Appellant asked Hakes if he could roll cigarettes and Hakes said he could. Appellant then got some marijuana out of his truck and Hakes sat on the passenger's side of the truck and started making cigarettes. Appellant and Robb were standing nearby and conversing.

After talking for a few minutes appellant tried to kiss Robb and she refused. Appellant then apologized. A few minutes later appellant pulled out a pistol and pointed it at Robb and told Hakes to get out of the truck and lie down on the ground in a "spread-eagle" position. Hakes com-

plied with this demand. Appellant then told Robb if she didn't do what he told her that he would shoot Hakes. Appellant was holding Robb and told her to take off her clothes. She refused and appellant pulled on her dress and began striking her on her head with the butt of the gun. Robb managed to break loose and started running toward the woods. While running she heard gunshots and felt a sharp pain in her buttocks. She fell and crawled into the woods and tried to cover herself with leaves.

Robb further testified she heard someone trying to crank the truck but the motor did not start. Shortly thereafter she heard footsteps running in the direction that came to the place where appellant stopped his truck. Thinking, perhaps, that appellant had left, she emerged from the woods looking for Leslie Hakes. She called his name but he did not answer. She started looking around the truck and found him lying on the ground with a big puddle underneath his head. He didn't move, so she didn't touch him. She then crawled down the cliff to another road and lay in the middle of the road waiting for help.

On cross-examination she stated that, when appellant arrived at the clearing, he turned his truck around facing the direction from which it had come. She also stated that she had been dating Hakes for about two months. She admitted that Hakes stayed in her barracks Friday night and they were together all day Saturday. She also admitted that she and Hakes went to a place known as "Poor Richard's" Saturday night and drank about six beers apiece. She further stated that, although she knew Hakes rolled marijuana cigarettes, she could not recall anyone smoking them. She said even though appellant struck her on the head with the butt end of his pistol this did not cause any bleeding or cause lacerations. She said appellant only hit her once with the pistol before she broke away from him and ran into the

woods. She further testified that she did not remember touching the truck after returning from the woods and finding Hakes dead. She admitted that her blood type was A.

On redirect examination Robb testified that she was shot three times that night. In addition to being shot in her left buttock she was shot in her left ear and left arm. She did not really know she had been shot in the ear and arm until she was in the hospital.

John M. Case, a criminalist with the Department of Forensic Sciences, testified that the six cartridge casings found around the truck were all fired from appellant's gun. Gunpowder was found at the bottom of the back of Hakes' shirt.

On cross-examination Case testified that, when he test-fired the weapon at a cloth target from a distance of three feet, he found three particles of powder which fell off the cloth with no definite pattern. He said, to find powder burns on the skin, it was his opinion that the shot would have to be fired within a distance of twelve inches.

John Norris, an Evidence Technician with the Anniston Police Department, testified that, on the night of August 20, 1978, he was on Hillyer High Road near the crest of the road on the mountain; that Greenbrier Road was about 400 yards south of him. He was off duty and was there with a friend and his date; that he heard a series of shots. Two shots were in rapid succession, then a pause of several seconds followed by three shots in rapid succession, another pause for about a minute, and then one final shot; that the sound of the shots came from the south in the direction of Greenbrier Road. Upon hearing the series of shots Officer Norris picked up the CB radio and contacted the Anniston Police Department. He remained where he was until a police unit arrived.

On cross-examination Officer Norris stated he heard the shots at about 1:10 a.m. and had arrived in the area approximately five minutes before he heard the gunfire. He said the shots sounded like they were about 300 yards away.

Sergeant Charles Hall of the Anniston Police Department testified that a dispatch came in relating that shots had been fired on Greenbrier Road. He drove to Hillyer High Road and contacted Officer Norris. When he arrived on Greenbrier Road between 2:00 and 3:00 a.m., he found two cars stopped on the road and a woman lying in the roadway. Hall went to the woman and saw that she looked as though she had been beaten and shot. He observed blood coming from the side of her head and she complained of being shot in a section of her back. According to Sergeant Hall the woman kept saying her boyfriend had been shot.

Sergeant Hall left the woman with another police officer and went to search for the man who allegedly had been shot. He proceeded north on Greenbrier Road up to the top of the mountain. Two police officers were in a car behind him. When he went down a deserted road overlooking Greenbrier he saw a green pickup truck which he recognized as belonging to appellant. Hall looked behind the truck and found the body. The body was fifteen or twenty feet beyond the truck with the feet to the rear of the truck with the head pointed south. After securing the scene he searched the wooded area for anyone else who might have been involved, without success. He then called for the detectives and the crime laboratory. He made a diligent effort to find appellant but his efforts proved fruitless.

Sergeant Hall identified State's Exhibits 1, 2, 4, 5, 7, 8, 9, 10, 11, 12 and 13 as truly depicting the scene as he viewed it at the time he saw it. The court sustained appellant's objections to Exhibits 1 and 4 but allowed the other photographs into evidence.

During his investigation Hall saw a .45 automatic cartridge casing on the ground near the wheel of the green pickup truck and others scattered around in the area. He also found a half consumed bottle of beer a good way down the road from the truck. The bottle was cold and he picked it up and took it to the truck. He said he may have placed it on a battery there.

On cross-examination Hall stated the cold bottle of beer was found about fifty yards back up the roadway north of the front of the truck.

Lieutenant Richard Townsley of the Anniston Police Department testified that he went to the small clearing at the end of a jeep trail overlooking Greenbrier Road. After examining State's Exhibit 11, the officer stated there was a cliff just beyond the location of the body shown in the photograph. He also found a fresh-fired .45 caliber cartridge casing on the ground near the truck as well as five other cartridge casings in the same condition in the area. He found a battery on the ground with jumper cables connecting it to the battery under the hood of the truck; an unrolled sleeping bag with appellant's name on it; some partially smoked marijuana cigarettes; a blood stained hand print on the passenger's side of the truck; one lead projectile on the ground near the head of Leslie Hakes, and a set of keys to the truck was given him by Lieutenant Hale. It was Townsley's opinion that the lead projectile under Hakes' head was fired downward at a 45 degree angle.

On cross-examination Townsley testified that two freshly rolled marijuana cigarettes were in the truck and a spilled plastic bag of marijuana was on the ground on the passenger's side of the truck. Particles of marijuana were found on the hands of Hakes. He also found five unopened cans of warm Pabst beer in the truck and a bottle of Michelob beer on top of the battery. He further stated that the heels

of Hakes were approximately six yards from the back of the truck and that Hakes was about six feet tall.

On redirect examination Townsley stated that State's Exhibits 26, 27 and 28, all being photographs of Hakes, accurately depicted the scene as he viewed it that night and were admitted into evidence without objection; that he observed only two holes in Hakes' body, (1) in the right back portion of the neck, and (2) in the left front portion of the upper neck. The lead projectile was found near the hole on the side of the neck that was facing downward.

Dr. Rembert Reynolds, General Surgeon in the Army and stationed at Fort McClellan, stated that he treated Kathy Robb in the Emergency Room the night she was brought to the hospital. She had been shot in the left earlobe, had abrasions and powder burns about the face and ear. She had wounds in the left upper arm where the bullet had entered and exited, also an entrance wound in the left buttock. X-rays revealed the bullet was lodged near the hip joint, and no attempt was made to remove the bullet.

Dr. William H. Landrum, who was employed by the Department of Forensic Sciences, testified that the blood on the fender of the truck was Group O human blood. Hakes' blood was also Group O. Three stains of blood were found on appellant's overalls or coveralls at the bottom of the left pants leg. Group A human blood was on the shoe strings of appellant's shoe. Group A human blood was the type found on appellant's pants leg. As we have pointed out, Robb's blood type is A.

Dr. Joseph Embry of the Department of Forensic Sciences testified that he performed the autopsy on the body of Leslie Hakes and found no gunpowder residue in or around the wounds. State's Exhibits 33 and 34 showed these wounds. The entrance and exit wounds were on the same

level in relation to the top of the head. Hakes also had some blanched or pressure areas on the left cheek and chin.

Appellant testified in his defense. He said he was a licensed gunsmith. He stated he went to a bar in Jacksonville Saturday night and drank about six beers. He was alone. On the way back to Anniston he picked up a couple who were hitchhiking. According to his testimony the man he picked up asked him if he wanted to party and appellant agreed. After failing to get some cold beer at the trailer home of the "bootlegger," appellant asked the man if he smoked and he said yes. Appellant furnished the marijuana and the man started rolling a cigarette, but appellant told him it wasn't good to ride around and smoke. The man asked him if he knew a place where they could stop and appellant replied that he knew a place close by. Appellant then drove to a place on top of the mountain and turned the truck around so that it faced the way he entered. All three got out of the truck.

The couple went into the woods to relieve themselves and appellant took a bedroll out of the truck and sat on it. A few minutes later the couple returned separately. The man sat in the truck and the girl and appellant were standing by the cab. Appellant stated the man rolled some marijuana cigarettes and the trio smoked them. According to appellant he and the girl went and sat on the bedroll and talked for a while. Then they started walking back to the truck. At this point appellant claimed the man was walking toward him and said, "That will cost you, buddy." He also told appellant to move away from the girl. The man appeared to have a gun and appellant became afraid and started to pull his gun from his pocket. At this time appellant claimed the girl grabbed his arm and in the struggle his gun went off and the girl relaxed her hold on his arm and he was able to pull his arm away. Appellant denied he

hit the girl on the head with the butt of his pistol. He claimed he pushed the girl in the direction of the approaching man and turned around and started to run away. As appellant ran into the woods he fired a few more shots in the direction of the couple.

Appellant stayed in the woods about ten minutes. He then returned to his truck to get his other pistol which had been in the glove compartment of the truck and which he found within a couple of feet of the body of the man he had killed. He tried to crank the truck but it wouldn't start. Appellant then went back into the woods and stayed until daylight. He then went to the home of a friend and called his father who soon arrived and picked him up. The next day he and his father went to the police station and surrendered both pistols and he turned himself in to the authorities.

Appellant stated his blood type was O.

On cross-examination appellant admitted that, when his pistol went off the first time, no one else had a finger on the trigger. He further admitted that no one shot at him or even threatened to shoot him or do anything else to him. He also admitted that as he was running away he just pointed the gun in the general direction he came from and fired several times. Appellant admitted that he saw Kathy Robb lying in the middle of Greenbrier Road and he did not go to her and offer to assist her in any way.

It can be readily seen from a recitation of the testimonies of Kathy Robb and appellant that they are poles apart as to what occurred on this fatal occasion on this lonely and deserted mountain top in Calhoun County that left a man dead and a bullet in Robb's buttock that she will carry with her to the grave. What is the truth? The jury sided with Kathy Robb and against appellant.

Dr. Wendell Sowell testified as an expert for the defense. He stated that he test-fired the .45 caliber automatic in this case into a bar of Octagon soap which has practically the same consistency as the human neck. When he fired at the distance of three feet there was a lot of gunpowder residue in a definite pattern. In none of the tests Dr. Sowell made did the bullet stay on top of the ground.

According to Dr. Sowell the wound in Leslie Hakes' neck appeared to have been a bullet that had hit something else before striking the deceased. He also said that the blood on appellant's clothing was drops, not splattered, and would have come from someone bleeding close to appellant. As to the hand print on the truck he said it was not appellant's because the hand print was 7⅝ inches and appellant's hand is only 7¼ inches long. It was also Dr. Sowell's opinion that the bullet found under the head of the deceased was on the ground and the deceased fell on top of the bullet.

On cross-examination this witness said that he had not been a full time Forensic man since 1968. He admitted using hollow-point bullets ammunition during the ballistics tests and that he fired straight into the ground. He did not measure the hand print on the truck but a photograph of the hand print.

Appellant contends he was entitled to a mistrial by the actions of the prosecutor during the voir dire qualifications of the jury venire in asking the venire if any of them knew the defendant and in asking the defendant to stand up. Appellant stood up at the request of the prosecutor before an objection was interposed and his counsel moved for a mistrial on the basis the defendant was asked to give testimony against himself. The trial court overruled the motion.

The law is clear that merely requesting a defendant to stand for purposes of identification before the jury venire is not a violation of his constitutional privilege against self-

incrimination. *Jones v. State,* 54 Ala.App. 167, 306 So.2d 33; judgment affirmed, 293 Ala. 762, 306 So.2d 45.

Appellant claims the prosecutor committed reversible error during his closing argument when he stated, "We've got the murder weapon," and pointed to the .45 automatic pistol which was introduced into evidence without objection. This same pistol was used by appellant in shooting Kathy Robb three times and in killing Leslie Hakes during the shooting spree arising out of the same incident and was clearly a part of the res gestae and fully supported by the evidence.

All facts admitted into evidence are subject to comment by counsel and counsel are allowed considerable latitude in drawing legal inferences from the evidence in their arguments to the jury. *Espey v. State,* 270 Ala. 669, 120 So.2d 904; *Roberts v. State,* Ala.Cr.App., 346 So.2d 473, cert. denied, Ala., 346 So.2d 478; *Colston v. State,* 57 Ala.App. 4, 325 So.2d 520, cert. denied, 295 Ala. 398, 325 So.2d 531; *Grissett v. State,* 241 Ala. 343, 2 So.2d 399.

The trial court did not err in admitting into evidence photographs of the deceased, Leslie Hakes, as they were clearly a part of the res gestae, and as shedding light on the acts, motive and intent of appellant. *Higginbotham v. State,* 262 Ala. 236, 78 So.2d 637; *Scott v. State,* Ala.Cr. App., 353 So.2d 36, cert. denied, 353 So.2d 40; *Hurst v. State,* 54 Ala.App. 254, 307 So.2d 62.

The granting or refusal of a motion for a new trial is a matter resting largely in the sound discretion of the trial court, and the exercise of discretion carries with it a presumption of correctness. Ala. Dig. Key No. 911. We find no error in overruling such motion.

The refused charges, stating correct principles of law, were fairly and adequately covered in the court's oral charge, or in the given charges requested by appellant.

We have carefully examined the entire record for errors injuriously affecting the substantial rights of the appellant and have found none. The judgment of conviction is affirmed.

AFFIRMED.

All the Judges concur, except Bookout, J., not sitting.

EXCERPTS FROM JURY INSTRUCTIONS

* * *

Now, Ladies and Gentlemen, it has been some evidence introduced in this case, and one of the defenses by the defendant from that evidence is the defense of self defense. The defendant alleges that he acted in self defense; therefore, I want to discuss the law of self defense with you. The law with respect to self defense as applies to the crime of assault with intent to murder is different from that with regard to the law of self defense as it applies to the crime of assault and battery.

We will take the assault with intent to murder first. It is said that neither divine nor human law requires us to love our neighbor better than ourself; and the law permits every person who is without fault in bringing on the difficulty and who has adopted every reasonable safe expedient means of averting the necessity to take the life of his assailant, or commit an assault with the intent to take the life of his assailant rather than lose his own life. Before the law will justify or excuse a homicide or assault with intent to murder under the plea of self defense, the jury trying the person asserting such plea must believe that such person did not himself intentionally do or say anything that provoked or encouraged the difficulty, that he was or appeared to be so menaced at the time as to create a reasonable apprehension of danger to his life or great bodily harm, and that apparently there was no other reasonable mode of escape from such impending peril without increasing that peril. It is never presumed that an unlawful homicide or an assault with intent to murder was committed in the right of self defense; therefore, the defendant so asserting this defense takes upon himself the duty of showing from the evidence that there was a present and impending peril, either actual or reasonably apparent to his life or danger of his receiving

great bodily harm at the time he struck the fatal blow or fired the fatal shot, or committed assault with intent to murder, and that at the time he actually or apparently had no reasonable known mode of escape without increasing his peril, unless the evidence offered by the State showing the assault with intent to murder also supplies such evidence. The defendant is never under any duty to show that he was free from fault or to show that he had not provoked the difficulty except as may be necessary to meet the evidence which is offered by the State of Alabama to show that he was not free from fault or to show that he did provoke the difficulty. All of the aforementioned elements of self defense must co-exist at the time the alleged shot was fired in order for one to successfully invoke the law of self defense to a charge of assault with intent to murder. If one of these elements is absent, one of these three elements, then a person may not commit an assault with intent to murder in alleged self defense. Now, when self defense is pleaded in justification of assault and battery, these are the elements of the defense of self defense: The accused must not have provoked the difficulty. He must not have fought willingly; and he must not have used more force than was reasonably necessary to prevent or repel the attack upon him. You will notice that in this element of self defense to assault and battery, he was under no duty to retreat as he would be under self defense as to assault with intent to murder. The defendant does not have to be in imminent danger of losing his life or suffering great bodily harm, because, as you know as a matter of common sense, a man has a right to defend himself from any unlawful assault provided he does not go to the extent of taking life or assaulting with intent to murder or using more force than is reasonably necessary to prevent or repel the attack being made upon him. If you decide that merely an assault and battery has been committed,

and have a reasonable doubt, after hearing all of the testimony, as to whether or not the accused fought willingly or as to whether an accused used more force than was reasonably necessary to prevent or repel the attack, it will be your duty to acquit the defendant under the plea of self defense under the assault and battery charge, unless you are convinced beyond a reasonable doubt that he provoked the difficulty.

* * *

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RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF OF RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether the question of petitioner's being denied due process to the trial court's oral charge on self-defense is within the jurisdiction of the Supreme Court where this issue was not properly presented to the highest court of the State and was not reviewed.

II. Whether in Alabama is the burden of proof ever upon a defendant to prove self-defense and did the trial court's oral charge create such an impression.

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BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama is published at 403 So. 2d 303 (1981). The Alabama Supreme Court denied the petition for certiorari without opinion at 403 So. 2d 309 (1981).

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257. It is respondent's position that this Court is without jurisdiction to consider the issue presented since this issue was never properly presented to the highest court of the State and was not expressly passed on by the Alabama Supreme Court.

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "SECTION I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws."

28 U.S.C. §1257 states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari...where any title, right, privilege or immunity is

specially set up or claimed under the Constitution...."

Rule 39(k), Alabama Rules of Appellate Procedure, states:

> "(k) Scope of review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to the request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct."

STATEMENT OF THE CASE

Petitioner, Ernest Donald Suggs, was indicted for assault with intent to murder by the grand jury of Calhoun County, Alabama. He pleaded not guilty. His trial began on June 11, 1979, in the Seventh Judicial Circuit of Alabama. On June 13, 1979, he was found guilty and sentenced to 14 years imprisonment. He gave notice of appeal and filed a motion for new trial, which

was denied on August 6, 1979. On May 5, 1981, the Alabama Court of Criminal Appeals affirmed his conviction. The opinion of the Alabama Court of Criminal Appeals did not address any issue regarding the trial court's oral charge. Petitioner filed a motion for rehearing which was denied on June 23, 1981. He then filed a petition for a writ of certiorari in the Supreme Court of Alabama on July 7, 1981. The Petitioner in his petition for writ of certiorari did not assert that he used Rule 39(k), Alabama Rules of Appellate Procedure, to bring the trial court's oral charge to the Court of Criminal Appeals' attention on rehearing.

REASONS FOR DENIAL OF THE WRIT

1. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW ISSUE OF THE TRIAL COURT'S ORAL CHARGE WHICH WAS NOT PROPERLY PRESENTED AND REVIEWED BY THE STATE'S HIGHEST COURT.

On May 5, 1981, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction without addressing the issue of whether the trial court's oral charge on self-defense was incorrect.

Then, on July 7, 1981, when the Petitioner filed his petition for writ of certiorari before the Alabama Supreme Court he neglected to state that he had used Rule 39(k), Alabama Rules of Appellate Procedure, to bring the trial court's oral charge to the Court of Criminal Appeals' attention on rehearing.

Since review of the Supreme Court of Alabama is limited to the facts stated in the opinion of the Court of Criminal Appeals unless on rehearing a Rule 39(k) motion is used to present an additional or corrected statement of facts, the Alabama Supreme Court did not have the power to address this issue. Rule 39(k), Alabama Rules of Appellate Procedure.

In Street v. New York, 394 U.S. 576 (1969), it was held that if a question is not presented to the State courts in such a manner that it is decided by the highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

In Michigan v. Tyler, 436 U.S. 499 (1978), the Supreme Court held that the failure of a litigant to follow proper procedure resulting in the refusal

of a State Court to consider a question, constitutes adequate grounds for barring review in the U. S. Supreme Court so long as the State has a legitimate interest in enforcing its procedural rule.

Therefore, since the Alabama Supreme Court could not review the trial court's oral charge, there is no jurisdiction for this Court to review this issue either.

2. IN ALABAMA THE BURDEN OF PROOF IS NEVER UPON A DEFENDANT TO PROVE SELF-DEFENSE AND THE TRIAL COURT'S ORAL CHARGE DID NOT CREATE THIS IMPRESSION.

In Alabama the burden is never upon the defendent to prove self-defense. In any homicide case in which there is evidence of self-defense, the burden is upon the State to satisfy the jury by the evidence beyond a reasonable doubt that the defendant is guilty, and this burden is not shifted from the State to defendant by reason of applicability to the particular case of the defense of self-defense or defense of another. Howard v. State, 390 So. 2d 1070, 1072 (Ala. Cr. App.), writ denied 390 So. 2d 1077 (Ala. 1980).

Moreover, as stated in the trial court's oral charge, the defendant has only the duty to show some evidence of self-defense and he need not even offer any evidence of self defense at all if the evidence offered by the State showing assault with intent to murder also supplies such evidence. (Petitioner's Appendix page 14).

Therefore, the present case is unlike Hollo-way v. McElroy, 632 F. 2d 605 (5th Cir. 1980), wherein a Georgia State Court had instructed the jury that the presumption of innocence was removed and burden of proving self-defense was on the slayer once an intentional homicide had been proven. 632 F. 2d at 619.

In any case it should be noted that at the end of the trial court's oral charge before the jury retired the Petitioner's attorneys made it clear that the defendant was not raising the issue of self-defense but was claiming that what occurred was an accident. (R-376-378).

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

Elizabeth Ann Evans
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ASSISTANT ATTORNEY GENERAL
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CERTIFICATE OF SERVICE

I, Elizabeth Ann Evans, an Assistant Attorney General of Alabama and a member of the Bar of the Supreme Court of the United States, do hereby certify that-on this 8th day of January, 1982, I did serve three copies of the foregoing on the Attorney for Ernest Donald Suggs, Petitioner, by mailing same to him, first class postage prepaid and addressed as follows:

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CLERK

No. 81-761

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ERNEST DONALD SUGGS,
Petitioner

v.

STATE OF ALABAMA,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257

Respondent has argued that this Court has no jurisdiction based on overly strict interpretation of Rule 39 (k), Alabama Rules of Appellate Procedure, and a footnote in *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978). Respondent has misconstrued both Rule 39 (k) and the standard for determining whether this Court has jurisdiction under 28 U.S.C. § 1257.

First, Rule 39 (k), Alabama Rules of Appellate Procedure is not an absolute prohibition against the Supreme Court of Alabama looking to the record for facts not in-

cluded in the opinion of the Alabama Court of Criminal Appeals. The Rule merely states that "[t]he review . . . will *ordinarily* be limited. . . ." (emp. supp.) The Committee Comments to Rule 39 also state that the Rule is not absolute.

> The scope of review is generally that which is now used and with which the Bar is familiar. This includes . . . the rules that in many instances, this court can go to the record for a more complete understanding of those features treated in the opinion of a court of appeals. See cases cited in both the opinion and concurring opinion. *Johnson v. State,* 287 Ala. 576, 253 So. 2d 344, and this action of the court may be ex mero motu, *Wilbanks v. State,* 289 Ala. 171, 266 So.2d 632.

Alabama Rules of Court at 446-47 (1979 Desk Copy). Also, Rule 1, Alabama Rules of Appellate Procedure, states that the Rules "shall be construed so as to assure the just, speedy and inexpensive determination of every appellate proceeding on its merits." To accept respondent's overly strict construct of Rule 39 (k) would deny petitioner a just determination on the merits.

Furthermore, "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York,* 394 U.S. 576, 583 (1969). In *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928), quoted in *Street v. New York, supra* at 584, this Court described the proper standard for determining whether a federal question has been properly raised as follows:

> No particular form of words or phrases is essential, but only that the claim . . . and the ground therefor be brought to the attention of the state court with fair precision and in due time.

Petitioner briefed the issue of the constitutionality of the portion of the jury charge on self-defense to the Alabama Supreme Court. In fact, most of the first full paragraph on page five of the petition for certiorari is taken verbatim from a paragraph on page 40 of petitioner's brief to the Alabama Supreme Court. Petitioner has brought the federal question to the attention of the state court with fair precision and in due time.

II. THE TRIAL COURT'S JURY INSTRUCTION COULD HAVE LEFT THE IMPRESSION THAT THE BURDEN OF PERSUASION ON THE ISSUE OF SELF-DEFENSE IS ON THE PETITIONER

Based on *Howard v. State,* 390 So.2d 1070 (Ala. Cr. App.) *writ denied* 390 So.2d 1077 (Ala. 1980) and the cases cited therein, the law in Alabama, as in Georgia, is that once a defendant presents evidence on the issue of self defense, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. Therefore, *Holloway v. McElroy,* 632 F.2d 605 (5th Cir. 1980), *cert. denied,* ..... U.S. ....., 49 U.S.L.W. 3881 (1981) applies in Alabama, just as it does in Georgia.

However, *Howard* and the cases cited therein indicate an ambivalence about the burden of proof on self-defense: they say that the burden is on the State to prove beyond a reasonable doubt that a defendant did not act in self-defense, but they also say that the trial court cannot tell this to the jury in plain terms. It is this ambivalence which leads a Trial Court to say to the jury that "it is never presumed that an unlawful homicide is committed in the right of self-defense. . . ." (App. 14), and this ambivalence can lead a jury to conclude that the burden is on the defendant. Of course, the Trial Court decides whether an issue goes to the

jury. Once the Court allows the issue of self-defense to go to the jury, it must say in plain and unambivalent terms that the burden of proof on the issue of self-defense is on the State. Otherwise, as described in *Holloway*, the defendant's right to due process is violated.

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